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No. 89-1076

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

RAY L. CORONA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY MEMORANDUM FOR PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. FACTS AND DECISION BELOW	1
II. EXISTENCE OF CONFLICTS	3
III. DOUBLE JEOPARDY	5
CONCLUSION	6

TABLE OF AUTHORITIES

CASES: Page

Brennan v. United States, 867 F.2d 111 (2d Cir.), *cert. denied*, 109 S. Ct. 1750 (1989) 4
Callanan v. United States, 881 F.2d 229 (6th Cir. 1989), *petitions for cert. pending*, Nos. 89-6203/6184 (filed December 1 and 2, 1989) 4
Cooper v. United States, 639 F. Supp. 176 (M.D. Fla. 1986), *aff'd mem.*, 822 F.2d 63 (11th Cir.), *cert. denied*, 484 U.S. 947 (1987) 4
McCulloch v. United States, 484 U.S. 947 (1987) 5
Richardson v. United States, 468 U.S. 317 (1984) 5
United States v. Alexander, 850 F.2d 1500 (11th Cir. 1988), *vacated and remanded*, 109 S.Ct. 3236 (1989), *on remand*, 888 F.2d 777 (11th Cir. 1989) 4
United States v. Anderson, 809 F.2d 1281 (7th Cir. 1987) 4
United States v. Brown, 583 F.2d 659 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) 4
United States v. Erwin, 793 F.2d 656 (5th Cir.), *cert. denied*, 479 U.S. 991 (1986) 4
United States v. Gulledge, 739 F.2d 582 (11th Cir. 1984) 5
United States v. Holzer, 840 F.2d 1343 (7th Cir. 1988) 3
United States v. Kragness, 830 F.2d 842 (8th Cir. 1987) 3, 4
United States v. Lopez, 803 F.2d 969 (9th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987) 4
United States v. Mandel, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3190 (1989) 3
United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983) 4
United States v. Pepe, 747 F.2d 632 (11th Cir. 1984) 4
United States v. Ruggiero, 726 F.2d 913 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984) 3
United States v. Zauber, 857 F.2d 137 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1340 (1989) 5

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I. FACTS AND DECISION BELOW

The Brief for the United States in Opposition ("Gov't Brief") conveys the mistaken impression that the three Travel Act predicates on which the jury made no findings were *subsumed* within mail fraud counts (later dismissed) on which the jury convicted. (*See* Gov't Brief 9-10). The Government's Brief implies that the Travel Act predicates were thus in the nature of lesser included offenses, such that the jury's verdict on the now-dismissed mail frauds represented a finding on every element of the Travel Act predicates. This is completely wrong.

First of all, the mail fraud counts on which the jury convicted all involved events occurring in 1981 and 1982. The Travel Act predicates in question all involved events

occurring in 1977 and 1978.[1] Second, the Travel Act predicates required proof of critical elements not required for mail fraud: (1) that petitioner Corona knew Fernandez was a marijuana dealer, and (2) that Corona knowingly helped Fernandez distribute the proceeds of his marijuana business.[2]

The Government's proof that Corona knowingly distributed proceeds of a marijuana business was questionable. The Court of Appeals ruled that the evidence was legally sufficient to show that Corona knew Fernandez was a marijuana dealer, but emphasized that the Government's proof was much stronger in 1981 and 1982, *after* Corona learned of Fernandez's arrest for marijuana dealing.[3]

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[1] *See* Petition 4 n.3; and compare Counts III, IV and V of the indictment (the 1981 and 1982 mail frauds on which the jury convicted) with predicate Racketeering Acts 20, 21 and 22 (the Travel Act predicates on which the jury made no findings).

[2] The Government claims that Corona conceded in the Court of Appeals that the only issue on both the Travel Act counts and the mail fraud counts was whether Corona knew that someone was fronting for Fernandez when he bought the Bank. (*See* Gov't Brief 9). Corona did no such thing. Corona argued in the Court of Appeals that "[i]f the defendants *prevailed* on the mail fraud charges, conviction on the Travel Act charges would be impossible." (Corona Brief on Appeal 68) (emphasis added). The Court of Appeals erroneously inverted Corona's argument, claiming that Corona had conceded that *conviction* on the mail fraud charges would necessitate findings of guilt on the Travel Act charges. (*See* App. 17a). Corona never made such a concession and, in fact, most of the Court of Appeals opinion was a response to Corona's argument that the evidence of his knowledge of Fernandez' marijuana dealings was insufficient.

[3] The Court of Appeals said:

> A trier of fact could conclude that after Fernandez's indictment and March 1981 arrest on drug charges, Ray Corona was aware of Fernandez's unlawful activity. Both of his Travel Act convictions resulted from events occurring *after* Fernandez's arrest. (App. 11a) (emphasis in original).

The Government argues that "the jury had more than ample evidence to conclude" that Corona knew Fernandez was a drug dealer

The jury's verdict on the 1981 and 1982 mail frauds may not even remotely be said to represent a jury finding on the elements of Travel Act violations alleged to have occurred in 1977 and 1978, and the Court of Appeals never said otherwise. Instead, the Court of Appeals said that if the jury acted reasonably, it would have found that the Travel Act predicates were proven. Thus, the Court of Appeals said, "the jury could not *reasonably* have found that Ray Corona performed the mail fraud but not the Travel Act conduct," (App. 17a) (emphasis added); and later the Court of Appeals said, "The jury could not *reasonably* have relied on the now-dismissed mail fraud[s]" without also relying on the Travel Act predicates. (App. 17a) (emphasis added).

In sum, the Court of Appeals based its decision not on what this jury actually found, but on what the Court of Appeals thought a *reasonable* jury would have found.

II. EXISTENCE OF CONFLICTS

The Government's effort to reconcile the seventeen recent court of appeals RICO decisions cited in the petition fails hopelessly. Each of these seventeen decisions presents the question of whether a RICO conviction may stand when some, but not all, of the predicate acts submitted to the jury are later ruled invalid. The decisions are all over the lot.

Many cases reverse for a new trial unless there is a separate jury finding on at least two of the valid predicate acts.[4] These cases specifically decline to analyze the

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even in 1977 and 1978. (*See* Gov't Brief 10 n.7). But the jury never made a finding on this issue; and it is the jury, not the Government or the Court of Appeals, which must decide whether Corona is guilty of the Travel Act predicates in 1977 and 1978.

[4] *See, e.g., United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3190 (1989); *United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988); *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987); *United States v. Ruggiero*, 726 F.2d 913 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984).

evidence with a view to deciding what a reasonable jury would have done.[5]

In square conflict with these holdings are the decision of the Eleventh Circuit in this case and the decision of the Sixth Circuit in *Callanan v. United States*, 881 F.2d 229 (6th Cir. 1989), *petitions for cert. pending*, Nos. 89-6184/6203 (filed December 1 and 2, 1989), which affirmed RICO convictions in spite of the absence of a *jury* finding on two or more valid predicates. These two circuits now permit the Court of Appeals to affirm if, in the judgment of the Court of Appeals, a *reasonable* jury would have made such findings.[6]

Many cases hold that where there are separate findings on two valid predicates, the RICO conviction should be affirmed.[7] In square conflict with this line of cases, the Third Circuit has ruled that a new trial is necessary even if the jury did make separate findings on two valid predicates. *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978). This is because two predicates are not sufficient to support a RICO conviction. The jury must also find a "pattern." The jury may have relied on invalid predi-

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[5] *See, e.g., United States v. Kragness*, 830 F.2d at 861.

[6] In *Callanan*, the Court of Appeals inferred from the convictions of an alleged intermediary in a series of bribes that the jury would have found the ultimate recipient guilty of the same series of bribes. *Callanan v. United States*, 881 F.2d at 234-35.

[7] *See, e.g., Brennan v. United States*, 867 F.2d 111 (2d Cir.), *cert. denied*, 109 S. Ct. 1750 (1989); *United States v. Lopez*, 803 F.2d 969 (9th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987); *United States v. Peacock*, 654 F.2d 339 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983); *United States v. Anderson*, 809 F.2d 1281 (7th Cir. 1987); *United States v. Erwin*, 793 F.2d 656 (5th Cir.), *cert. denied*, 479 U.S. 1991 (1986); *Cooper v. United States*, 639 F. Supp. 176 (M.D. Fla. 1986), *aff'd mem.*, 822 F.2d 63 (11th Cir.), *cert. denied*, 484 U.S. 947 (1987); *United States v. Pepe*, 747 F.2d 632 (11th Cir. 1984); *United States v. Alexander*, 850 F.2d 1500 (11th Cir. 1988), *vacated and remanded*, 109 S. Ct. 3236 (1989), *on remand*, 888 F.2d 777 (11th Cir. 1989).

cates in finding a pattern even where two valid predicates remain.[8]

Contrary to the Government's argument (Gov't Brief 12 n.8), *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1340 (1989), does not alter the rule of *Brown*. *Zauber* cites *Brown* with approval, and distinguishes it on the ground that the jury instructions in *Zauber* permitted guilt findings on invalid mail fraud predicates only if the jury first found a corresponding valid kickback predicate. 857 F.2d at 152. Given that instruction, the setting aside of mail fraud predicates could not have affected the verdict. *Id.* at 154.

III. DOUBLE JEOPARDY

The Government states in its Brief (Gov't Brief 13) that after *Richardson v. United States*, 468 U.S. 317 (1984), "[n]o court of appeals has interpreted the Double Jeopardy Clause" to permit a defendant to raise the issue of sufficiency of the evidence at a first trial ending in a hung jury on an appeal from conviction after a second trial. This is inaccurate. In *United States v. Gulledge*, 739 F.2d 582 (11th Cir. 1984), a case decided after *Richardson*, the court stated that a claim of insufficient evidence at a first trial ending in a hung jury "is not appealable *until* a final decision has been rendered." 739 F.2d at 584 (emphasis added). The court in *Gulledge* considered *Richardson* and concluded that "the effect of the [*Richardson*] decision is that henceforth such claims may not be appealed *before* final judgment." *Id.* at 585 (emphasis added).

As recognized by the court in *Gulledge*, *Richardson* held only that an appeal could not be taken between trials after a hung jury to *prevent* a retrial. *See Richard-*

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[8] Two Justices noted in *McCulloch v. United States*, 484 U.S. 947 (1987) (White and Brennan, J.J., dissenting from denial of certiorari), that *Brown* is in conflict with decisions in other circuits on this point.

son v. United States, 468 U.S. at 326. The question whether the appeal may be taken *after* conviction at a retrial remains open. We respectfully submit that certiorari should be granted to resolve this open question.

CONCLUSION

For all the above reasons, we submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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